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In the Supreme Court of the United States

October Term, 1968

DAVE EVANS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Dave Evans, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated January 9, 1968, affirmed the judgment of conviction.

The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix A, *infra*. The judgment order of the Court of Appeals was entered January 9, 1968, and is reprinted as Appendix B, *infra*. A Petition for Rehearing En Banc was timely filed but was denied by order dated April 17, 1968, which order is reprinted as Appendix C, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1968, Appendix B, *infra*. Petition for rehearing was denied on April 17, 1968, Appendix C, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether under *Krulewitch* v. *United States*, 336 U.S. 440 (1949) and *Ingram* v. *United States* 360 U.S. 672 (1959), a conviction for conspiracy to violate the Hobbs Act, 18, U.S.C. §1951, can be sustained on the theory of guilt by association where there is no proof of knowledge of or acquiescence in the unilateral extortionate act of a co-defendant.

2. Are the principles of *Michelson* v. *United States*, 335 U.S. 469 (1948) violated when the District Court refuses to allow evidence of the defendant's good reputation in the business community when the crime charged relates to improper activities in that business?

3. Was the petitioner deprived of his right of cross-examination, guaranteed by the Sixth Amendment to the Constitution, when he was denied access to the grand jury testimony of important government witnesses, prohibited from determining the addresses of these witnesses, and from inquiring into their motives in testifying?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1951, reads in part:

"§ 1951. *Interference with commerce by threats or violence.* (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement or any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

STATEMENT OF THE CASE.

The substance of the indictment was that petitioner, Dave Evans, together with two others, Joseph Amabile and Salvatore Battaglia,[1] were indicted for conspiracy to violate the Hobbs Act, Title 18, U.S. Code, Section 1951. The one-count conspiracy indictment charged that the three defendants, together with alleged co-conspirators, non-defendant Rocco Pranno, conspired "to obstruct, delay and affect commerce" in the construction of multiple dwelling units in Lansing, Illinois, and to obstruct "the movement in interstate commerce of materials, supplies and other commodities required for the construction, sale, rental and management of the units, and to attempt to do so by extortion."

The indictment alleged that the conspiracy began "in or about July, 1964" and continued to the time of the filing of the indictment, February 16, 1967. It charged that as part of the conspiracy the defendants and co-conspirator "would attempt to obtain and did obtain property to the value of $48,500 in the form of money, from the Riley Management Corporation . . . induced by the wrongful use of fear in that the defendants and co-conspirator by threatening language did put and attempt to put William Riley in fear of bodily harm and in fear of his personal safety and security and did threaten economic harm to the Riley Management Corporation and to William Riley" unless and until Riley would cause the payment of the money to the defendants and co-conspirator by the Riley Management Corporation (A. 19-21).

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[1] Separate Petitions will be filed by these defendants.

STATEMENT OF THE FACTS

(a) Evidence of The Three Government Witnesses Relating to the Alleged Conspiracy.

William Riley was President of the Riley Management Corporation. (A. 489). His company was building the King Arthur project, a group of apartment buildings, in Lansing, Illinois. Petitioner Dave Evans was his superintendent of construction on that job (A. 501).

In June, 1964, Riley had a conversation with Evans in which he told Evans that the Lansing job was to begin and that Evans was to let the sewer contract. Riley told Evans that he did not want the people from Melrose Park, especially Amabile and Palermo, to know of this Lansing project (A. 502-3). A few days later, Palermo contacted Riley about the work on the Lansing project (A. 503).

In late July or early August, 1964, Amabile, DiVito and Pranno met. DiVito had been in the sewer contracting business for a number of years. Amabile told DiVito and Pranno that they could get the sewer and water mains contract of the Lansing project if they could come up with a "good clean fellow" to head the job (A. 124).

In mid-September, Pranno and DiVito spoke with LaKey and convinced him to take charge of the company that would have the sewer contract for the Lansing project (A. 126-7)

Later during the month of September, Pranno, DiVito and Evans met at Amabile's apartment and Pranno informed Amabile that they had a "good clean fellow", LaKey. Amabile then said he would give them the job but that he wanted $20,000 "off the top" from them. Pranno agreed to give Amabile the money (A. 128-9, 256).

Government witnesses Mike DiVito, Henry LaKey and an unindicted alleged co-conspirator, Rocco Pranno, formed the Carlson Construction Company in October, 1964, for the purpose of bidding on and getting the sewer construction job (A. 130-132).

Pranno loaned Carlson Construction Company approximately $13,000 for its initial bank deposit in order to start business (A. 273). Some $12,090 of that initial money was deposited by LaKey to the account of Carlson Construction Company in October, 1964 (A. 273). Pranno, DiVito and LaKey borrowed an additional $5,000 in cash for the Carlson Construction Company account (A. 146).

The Carlson Construction Company commenced operations. It put in the pipes, water lines and water pumping lifts (A. 287-8).

Because of urgencies, shipments were made to the project in Lansing, Illinois, quite rapidly from the Granco Steel Company, St. Louis, Missouri. "These shipments had been expedited rather than delayed." They were sent earlier to Lansing from Missouri than was normally done (A. 108).

DiVito and Pranno informed Amabile that they would need more money on the job if Amabile was to get his $20,000. Amabile instructed Evans to "jack up" the price of the contract. Evans did so by preparing another bid some $40,000 to $45,000 higher (A. 310). There was no need to "jack up" the prices of the construction if extortion was to be the means to obtain money.

In November, 1964, Amabile instructed LaKey to make the first draw from the Riley Company. LaKey drew up the papers calling for a draw of $55,000 (A. 537). However, Evans reworked the figures and arrived at the amount of $47,517.97 (A. 302).

On November 12, 1964, LaKey obtained the first draw from the Riley Company for its work in the amount of $47,517.97 (A. 303). LaKey deposited $39,000 in the Carlson bank account, keeping $8,517 (A. 304). He said he gave Pranno $8,000 in cash, retaining $517 himself for two weeks of his salary (A. 305).

At Amabile's request, LaKey withdrew $20,000 in cash and gave it to Amabile on November 15, 1964 (A. 306-7).

LaKey and Amabile visited Evans, who was a patient in a hospital, and Amabile gave Evans a "wad of money" (A. 301).

Numerous conversations took place where Amabile instructed DiVito, LaKey, Pranno and Evans that Riley was not to learn of Pranno and Amabile's connection with the Carlson Construction Company. Amabile also told these men that Riley was not to know that Evans was in any way connected with the Carlson Construction Company (A. 140, 143, 281, 286, 347).

After the first draw had been made, LaKey complained to Evans that he was unable to pay his bills, and Evans allegedly told LaKey not to worry and stated: "I'll talk to Joe Shine and Joe Shine will talk to the man. We will see that the money is in the bank for you." (A. 342). This conversation again emphasized that Evans was intent on receiving money for the Carlson Construction Company so that the work could continue and the bills could be paid.

LaKey made a request for a second draw of $48,500 in early January, 1965 (A. 345). Riley's controller, one Sol Meltzer, refused to authorize a payout. Riley told LaKey that he would not authorize the payout because he learned that the suppliers on the job were not being paid (A. 349).

LaKey then told Amabile in Evans' presence that the second payout draw was turned down by the Riley people (A. 346). Amabile told Evans that he wanted Evans to go with LaKey to the Riley office the following morning (A. 346). The next morning, Evans suggested to LaKey that they should enter the Riley offices separately (A. 347). Evans and LaKey spoke with Riley concerning the second draw and Evans said that complications had developed on the job (A. 350), Riley again turned down LaKey (A. 351).

LaKey again returned to Amabile and informed him that Evans and he had been turned down by Riley (A. 351). At this meeting, Evans was not present. Amabile then told LaKey, "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." (A. 351).

The next day, Amabile and LaKey went to the offices of the Riley Company in Bellwood, Illinois and talked to Riley. Riley told Amabile that they couldn't pay because to do so would jeopardize his position with the lending institution. According to Riley, Amabile told Riley that he had to pay LaKey, that LaKey was a friend of theirs; and that, if he didn't pay, "all sorts of people would get mad" (A. 533). Amabile said that Riley had no choice in the matter, that he had to pay LaKey, that "the man" wanted him paid. Evans was not present at this meeting (A. 534-5).

Subsequently, Riley authorized the payout by Lawn Savings and Loan Association to Carlson Construction Company in the approximate amount of $48,500, the payment alleged in the indictment to have been extorted from him.

Riley testified that he authorized this payment because he was afraid of Amabile. Over objections, he testified he was afraid because, "in previous meetings I had been threatened repeatedly. I had been at numerous, numerous meetings, where I was threatened with physical harm, harm to my family, collapse of the company, ruination, employees threatened." (A. 536-8).

Over objections, Riley stated that Amabile and Nick Palermo (not referred to in the indictment anywhere) threatened him (A. 538-9).

Riley testified that as late as October, 1965, he thought Evans was a very fine man (A. 730).

From the second draw which LaKey received, he said he withdrew $17,000 for Amabile (from which LaKey got $5,000) (A. 358-361).

LaKey had gone to Florida after the payment of the second draw and was called there by Evans. Evans told him that there had been trouble on the job and that Amabile wanted to see him (A. 361).

LaKey returned from Florida and in the presence of Evans, Amabile told LaKey, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble." (A. 361-2). Since LaKey was present at the time of Amabile's threat, this conversation is an indication that even at this late date Evans was not aware of the threat and that Amabile was deliberately keeping knowledge of the threat from him.

(b) Evidence of Palermo-Amabile Threats Not Anywhere Alleged in the Indictment.

Riley testified that in April, 1962, he was in the offices of Nick Palermo's Melrose Park Plumbing Company. Palermo asked him about a proposed building project in Northlake, Illinois, and Amabile told Riley that he, Amabile, was the man in Northlake and that Riley was not going to build in Northlake without his permission. Amabile told Riley it would cost him $70,000 (A. 546). A number of subsequent meetings were held with Palermo and Amabile in 1962 and at one of these Amabile asked Riley if he had the $70,000. Riley said he did not. Palermo said that he had the ability to stop the project of Riley's then being constructed in Addison, Illinois. Riley said he could not pay $70,000. Amabile said to give him $30,000 in cash and $40,000 in checks. Subsequently, Riley paid Amabile $30,000 in cash (A. 548-557).

Riley testified that in September, 1963, Palermo and Amabile talked to him about the plumbing work for a project in Westmont, Illinois. Amabile told Riley he must give the plumbing work to Palermo. Riley objected to the quality of Palermo's work. Amabile told Riley that he was "nothing but a wise guy and he would handle [him] with a baseball bat if [he] didn't stop trying to be a wise guy" (A. 563-4). Riley asked to leave; Amabile told him he could not do so. They said that Riley's construction superintendent, one Hubley, was the cause of all the problems. Palermo said that he would bury Hubley, and Amabile added that he would hammer the nails in Hubley's coffin (A. 564). Then Amabile told Riley that he knew where Riley's mother lived, where his children went to school, and that he would need a candy cane from then on out if they did not get the plumbing contracts (A. 565).

(c) Evans-Battaglia.

Evans did not know, nor had he ever met Battaglia during the period of the alleged conspiracy. Evans first met Battaglia in 1967 on the day this case was first called in court (A. 853-4).

(d) The Defense.

The petitioner, Evans, testified in his own behalf. Though he was precluded from denying many of the important alleged conversations and occurrences and from introducing affirmative evidence of his innocence, Evans did make a general denial that he was not involved in the crime charged in the indictment (A. 919-920). Evans also testified that he never received any money from Amabile as alleged by the Government witnesses (A. 901).

Evans testified that he was 52 years old and that he had been gainfully employed in the construction business since he had been 18 years old. He had served with the United States Army and had received an honorable discharge. He had never been arrested (A. 850-1).

Evans also attempted to introduce evidence of his good reputation in the buisness community through four (4) witnesses who had known him for a long period of time. This evidence was declined by the trial judge (A. 811, 816, 820, 839).

REASONS FOR GRANTING THE WRIT

1. Under Krulewich v. United States, 336 U.S. 440 (1949) and Ingram v. United States, 360 U.S. 672 (1959), a conviction for conspiracy to violate the Hobbs Act, 18 U.S.C. §1951, cannot be sustained on the theory of guilt by association where there is no proof of knowledge of or acquiescence in the unilateral extortionate act of a co-defendant.

A.

The decision of the court below is based on the theory of guilt by association, specifically warned against by this Court in *Krulewitch* v. *United States,* 336 U.S. 440 (1949) (Jackson, J., concurring). Upon evidence of an association with a person who has in the past been "evil," a man is deemed to be accountable for any "evil" act that this associate may perpetrate.

Conceding that the petitioner was not aware of Amabile's extortion, the court below relied upon the evidence that "On this record, it is obvious that Evans knew of Riley's fear of Amabile . . . It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would be employing coercive means for obtaining a second draw." (Appendix A page 9 *infra*). The potential for abuse of this "birds of a feather" doctrine is unlimited. Mere association replaces the fundamental principle of *agreement* in the law of conspiracy. This theory should be considered as one of the "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions," *Grunewald* v. *United States,* 353 U.S. 391 at 404 (1957).

The danger inherent in the association theory is particularly evident in the case against the petitioner; even according to the government evidence, the petitioner was an unwilling and reluctant associate of Amabile. (App. 364). Further, the circumstances of Evans' relationship with Amabile would lead Evans to believe that Amabile intended to use non-violent means to obtain money from the Riley Management Corporation.

Viewing the evidence in the light most favorable to the Government, the petitioner knew that Amabile had arranged for Henry LaKey, a "good, clean fellow," to head the Carlson Construction Company. (App. 128-9). Amabile had also obtained the services of DiVito, a knowledgeable sewer contractor, who could actually perform the contract behind the facade of the Carlson Corporation. Evans knew that the contract prices were raised to insure all the co-conspirators receiving their share in excess of the costs of completing the contract work. Evans knew that Amabile stressed that Riley should never find out that Amabile or Pranno were in any way connected with the Carlson Construction Company. (A. 140, 143, 281, 286, 347). There was to be no direct contact between Amabile and Riley. These circumstances of necessity led Evans to believe that Amabile did not intend to repeat whatever actions had made Riley fear Amabile in the past.

In *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963), a conspiracy to violate the Hobbs Act, the court reversed the conviction of the defendant Dragna even though the victim testified that he actually feared Dragna as being connected with the underworld and associated Dragna's appearance with the extortionist, Carbo's, threat. Though Dragna had a discussion with the victim, in which he told the victim "you are dealing with . . . big people and if your

word is no good you are no good in this game," there was no evidence that he knew of or participated in the actual threat. The Court rejected any suggestion that "those having an underworld reputation have the burden of refraining from acting in such a fashion (or, it would seem, from being seen in association with others) when it might be construed as evincing an interested participation or threat of violence." Certainly if a man like Dragna who was actually feared himself is not to be deemed guilty because of his association with men who in fact commit extortion, the non-violent petitioner should not be convicted because of the knowledge that his associate was feared by the victim in the past.

The court below's misplaced reliance on the precedents of *Pereira* v. *United States,* 347 U.S. 1 (1954) and *Lefco* v. *United States,* 74 F.2d 66 (3rd Cir. 1934), to support its guilt by association theory demonstrates its misunderstanding of the conspiracy concept. This Court's decision in *Pereira* stands only for the evidentiary rule that if there is sufficient evidence of agreement to commit the crime charged, a co-conspirator is responsible for the acts and declarations of another co-conspirator which could have been reasonably foreseen to be necessary to carry out that conspiracy. *Pereira* does not stand for the boot strap method of proving the conspiracy itself by means of assumption and references based on association.

The court below has done exactly what the court in *United States* v. *Peoni,* 100 F.2d 401 (2nd Cir. 1938) warned against. In *Peoni,* the court said:

> "at times it seems to be supposed that once some kind of criminal concert is established, all parties are liable for everything any one of the original participants does, and even for what those do who join later. Nothing could be more untrue. . . . The confusion is

> perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in an execution of the concert to which the accused is privy, though that doctrine too is often abused."

This confusion in the court below has resulted in petitioner's conviction and in an illogical theory of the law of conspiracy.

B.

In its opinion, the court below further expanded the theory of guilt by association when it removed the requirement of the limitation of the scope of a conspiracy based on the determination of the common understanding, an aspect of specific intent. In so doing, the Seventh Circuit is in conflict with the Second Circuit, *United States* v. *Crimmins,* 123 F.2d 271 (1941), the Ninth Circuit *Twitchell* v. *United States,* 313 F.2d 425 (1963), the Sixth Circuit, *United States* v. *Barnes,* 383 F.2d 287 (1967) and, it is submitted, with this Court in *Ingram* v. *United States,* 360 U.S. 672 (1959).

The decision below held that a man who "embarked on a criminal venture of indefinite outline" has to "take his chances as to the methods used by the other co-conspirators." (Appendix A Page 11 *Infra*)

The evidence against the petitioner showed he entered into an agreement with Amabile, Pranno, DiVito and LaKey to obtain money from the Riley Management Corporation by fraud and deceit. However, the charges for which he stands convicted were of a conspiracy to extort by means of threats and violence.

The basis of the proven plan or agreement was secrecy and misrepresentations. All conspirators agreed that the one essential ingredient of success in this scheme was that

Amabile's connection with Carlson Construction Company was not to be revealed to Riley and that Amabile was to have no direct contact with Riley. How can a man's criminal responsibility rest on the assumption that he took "his chances" on activity that was in direct conflict with the agreed method of the scheme?

In *United States* v. *Crimmins,* 123 F.2d 271 (2d Cir. 1941), Judge Hand faced the interlocking problems of scope, the hearsay exception, and intent. He pointed out that although

> each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; [the] . . . acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. *It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding.* . . . (Emphasis added.)

This court held in *Stirone* v. *United States,* 361 U.S. 212 (1960) that indictments charging violations of the Hobbs Act must be narrowly construed. The requirement in a Hobbs Act conspiracy of an actual agreement for violence was stressed in *Carbo* v. *United States,* 314 F. 2d 718 (9th Cir. 1963). In speaking of the defendant Gibson, the court said at Page 734:

> "As to Appellant, Gibson, charged in the conspiracy counts, it must be noted that there are in fact two distinct conspiracies involved in the facts of the case. (1) The underlying conspiracy to gain control of Jordan. For business reasons of his own, Gibson was interested in furthering Carbo's ends in this respect

> and it is clear that the evidence is sufficient to connect him with this underlying conspiracy. (2) *the charged conspiracies to accomplish the underlying purpose by extortion and threatening communications.*
>
> The United States suggests that proof of the first is sufficient without more to constitute proof of the second. This is vigorously disputed by Gibson, who contends with justification that the existence of business relations with Carbo is in itself wholly consistent with innocence of the charged conspiracies . . . There can be little doubt that Gibson had his own business reasons entirely apart from those of Carbo and Palermo for wishing such a fight to take place. *The question is whether the record can support a determination that for these independent business reasons Gibson became a party to the Carbo-Palermo scheme for achieving control of Jordan through extortion and threats.*" (Emphasis added).

The evidence shows no *agreement* between the petitioner and Amabile to obtain money by means of threats or violence and without evidence of such an agreement a Hobbs Act conspiracy charge should not be sustained.

This court in *Ingram* v. *United States,* 360 U.S. 672 (1959) rejected an attempt to create a federal conspiracy violation where only a state substantive crime existed. This court at page 680 stated

> Without the knowledge, the intent cannot exist. . . . Further, to establish the intent, the evidence of knowledge must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference on inference, thus fashioning * * * a dragnet to draw in all substantive crimes.

This Court should again denounce the unbridled expansion of federal conspiracy jurisdiction.

2. The principles of Michelson v. United States, 335 U.S. 469 (1948) are violated when the District Court refuses to allow evidence of the defendant's good reputation in the business community when the crime charged relates to improper activities in that business.

Evidence of a defendant's character and reputation is one of the most vital strongholds in his defense. This Court has long recognized the importance of character evidence and in *Michelson* v. *United States,* 335 U.S. 469, 476 (1948) said, "This principle [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone . . . may be enough to raise a reasonable doubt of guilt . . ."

A declination by the trial court of a defendant's offer to prove his general reputation for honesty and integrity and truth and veracity, is reversible error. *Carnley* v. *United States,* 274 F.2d 69 (5th Cir. 1960)

The four character witnesses who testified in this case had known petitioner from five to twelve years. They had worked with him and were constantly in contact with him and other men in the community who had known and worked with him. The witnesses testified that they had discussed Evans with these other men. The witnesses were then asked if they knew Evans' general reputation in the community for honesty and integrity, truth and veracity and as a law abiding citizen. However, on approximately 24 occasions the trial court sustained the Government's objections to these questions (A. 811-16, 816-20, 820-27, 839-47).

The decision of the court below stated ". . . As to some of the questions, this may have been an overstrict application of *Michelson.* However, *no foundation was laid to show that these witnesses knew any of the people who lived*

in the community where Evans resided. Proof of reputation 'among a limited group such as fellow employees in a particular building' has been held inadmissible. 335 U.S. at p. 481, note 17; *Williams* v. *United States,* 168 U.S. 382, 397; *Kroot* v. *United States,* 66 F.2d 449, 451 (7th Cir. 1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jackson's precept not to 'disturb rulings of trial courts' in this troublesome field except in rare instances (335 U.S. at p. 480)." (Emphasis added) (Appendix A, Page 22 *Infra*)

This limitation of character evidence to the geographical area in which a man lives is unrealistic in view of the complex and everchanging society of today.' This Court should recognize that a man's reputation at the place of his day-in, day-out business is likely to be even more probative of his true character. In this regard Professor McCormick's statement is relevant:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCormick, Handbook of the Law of Evidence § 158 at 335 (1954)

See also *Whiting* v. *United States,* 296 F.2d 512, 517 (1st Cir. 1961) and Am. Jur. Proof of Facts Annotated Character and Reputation Notes, Page 185.

In *United States* v. *White,* 225 F.Supp. 514 (1963) the court said at page 522,

> "The community in which a man lives is not necessarily a geographical unit, but is rather composed of those

> relationships with others which arises where a man works, worships, shops, relaxes, and lives. Evidence tending to show a defendant's reputation in such places is no more difficult to establish than his reputation in his particular city-block, which may or may not be important in establishing the defendant's reputation."

Evidence of reputation in the business community was particularly crucial to the petitioner since his criminal activity was allegedly against his employer. The petitioner was portrayed as a disloyal employee of Riley. When a defendant's reputation involves a trait which affects the very charge against him, a trial court exclusion of such evidence is error. *Robinson* v. *United States,* 156 F.2d 574 (D.C. Cir. 1946).

This case affords an opportunity for this Court to enunciate the principle that a defendant is entitled to introduce evidence of his reputation of good character in the business community in which he works.

3. The petitioner was deprived of his right of cross-examination guaranteed by the Sixth Amendment to the Constitution when he was denied access to the grand jury testimony of important government witnesses, prohibited from determining the addresses of these witnesses and from inquiring into their motives in testifying.

This court recently stated in *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which the Court and other courts have been more nearly unanimous than in their expressions of belief that the right of

> . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

The three most important witnesses for the Government were DiVito, LaKey and Riley. The defense contended that the credibility of each of these individuals was subject to serious question. The testimony of these witnesses concerning conversations and oral statements made in various meetings were largely uncorroborated. DiVito and LaKey were accomplices, and Riley had definite reasons for hostility towards the petitioner.

Counsel for the defendant Amabile moved for the production of the grand jury testimony of the witness DiVito. The District Court asked counsel to provide him with authorities for its production (A. 195). Counsel for Battaglia called the trial court's attention to this Court's ruling in *Dennis* v. *United States,* 384 U.S. 855 (A. 233). However, the trial court informed all counsel that this motion was denied (A. 390). A similar motion for production of Riley's grand jury testimony was denied in the same manner (A. 689).

The opinion of the court below holds that "no particularized need for this testimony was shown, nor was there any showing that the ends of justice required production." (App. A, p. 20 *infra*).

It is submitted that this request for grand jury testimony came within the scope of *Dennis* v. *United States* and is in conflict with the decisions of Courts of Appeals in at least four other circuits. See: *United States* v. *Youngblood,* 379 F.2d 365 (2nd Cir. 1967); *Schlinsky* v. *United States,* 379 F.2d 735 (1st Cir. 1967); *Cargill* v. *United States,* 381 F.2d 849 (10th Cir. 1967); *Worthy* v. *United States,* 383 F.2d 524 D.C. Cir. 1967.

Counsel for the defendant Battaglia made inquiry into the residence of the witness Riley. When Government counsel objected and asked to be heard out of the presence of the jury, the trial court sustained the objection without a hearing (A. 723). This ruling is contrary to the decision of this Court in *Smith* v. *Illinois,* 390 U.S. 129. This error alone requires a *per curiam* reversal in this case.

Counsel for the defendants attempted to bring before the jury the facts that Riley was under indictment for theft in the State Court and that he was under investigation by the Internal Revenue Service for tax evasion and that his testimony was given in hope of securing favorable treatment from local and federal law enforcement officers concerning his illegal conduct (A. 615, 617-8). Professor McCormick has commented:

> The law recognizes the slanting effect upon human testimony of the . . . self-interest of the witness in the outcome of the case. Any such partiality, proceeding from any acts, relationships or motives, may be proven to impeach credibility . . . . [one such instance is] in a criminal case when the witness testifies for the state and it is shown that an indictment is pending against him . . . C. McCORMICK HANDBOOK OF THE LAW OF EVIDENCE, §40, at 82, 83, 84 (1954)

See *Harris* v. *United States,* 371 F.2d 365 (9th Cir. 1967); *Wheeler* v. *United States,* 351 F.2d 946 (1st Cir. 1965); *United States* v. *Masino,* 275 F.2d 129 (2d Cir. 1960). As the Second Circuit observed in *Masino:*

> Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined . . . . It was highly relevant and material to bring out that the state court charge . . . had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government. This is the kind

> of situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. 275 F.2d at 132.

It is obvious that the atmosphere in the courtroom was such that petitioner and the other defendants were denied effective use of their right of cross-examination guaranteed by the Sixth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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